

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Special Access Rates for Price Cap Local)	WC Docket No. 05-
Exchange Carriers)	25
)	
AT&T Corp. Petition for Rulemaking to)	
Reform Regulation of Incumbent Local)	
Exchange Carrier Rates for Interstate Special)	RM-10593
Access Services)	

COMMENTS BY TEXALTEL ON THE NOTICE OF PROPOSED RULEMAKING
RELATING TO SPECIAL ACCESS RATES FOR
PRICE CAP LOCAL EXCHANGE CARRIERS

TEXALTEL

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May __, 2005

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	4
I. SPECIAL ACCESS RULES NEED TO BE REVISED IN RECOGNITION THAT PREDICTIVE JUDGMENTS SUPPORTING PRICING FLEXIBILITY HAVE NOT BEEN SHOWN TO BE CORRECT.....	5
II. CONTINUATION OF EXISTING (OFTEN GRANDFATHERED) SPECIAL ACCESS TARIFFS.	6
III. PROHIBIT APPLICATION OF PER CIRCUIT TERM LIABILITIES WHEN SPECIAL ACCESS IS PURCHASED AS A WHOLESALE INPUT.....	7
CONCLUSION	8

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TEXALTEL is a trade association that represents competitive telecommunications carriers that are based in Texas but provide service throughout the country, including the territories served by all Price Cap Local Exchange Carriers. TEXALTEL members provide a varying array of services to their customers including basic local telephone service, prepaid services, xDSL and other high speed data services, cable and Voice over Internet Protocol services, also known as VoIP. TEXALTEL members have a vested interest in ensuring that the wholesale network remains available to competitive carriers throughout the United States allowing all consumers to have a choice in who provides their phone service and over what technology that services is provided. As such, our members have a

substantial interest in this proceeding as our members will have few competitive alternatives from special access facilities in many situations.

TEXALTEL comes before the Federal Communications Commission (the Commission) today to submit comments to the Commission's Notice for Proposed Rulemaking ("NPRM"). We appreciate the Commission providing the opportunity to provide comment in this proceeding.

INTRODUCTION AND SUMMARY

TEXALTEL files these comments in response to the *NPRM* regarding regulatory treatment of special access tariffs. The Commission requests comment on various specific issues as to appropriate regulatory requirements including existing requirements for tariff filing, continued pricing flexibility, and pricing requirements.

TEXALTEL agrees that that this is an appropriate time to look at the treatment of special access terms, conditions, and rates. The appropriateness of this review is highlighted by two facts. First, following the Commission's Triennial Review Remand Order¹ ("*TRRO*"), there will be circumstances where CLECs will have greater reliance on special access than at any time since the passage of the federal Telecommunications Act of 1996 ("FTA"). In making this observation, TEXALTEL is not attempting to relitigate, complain, or collaterally attack the TRRO. But rather, this is a recognition that the TRRO did not require a specific

¹ *Unbundled Access to Network Elements (WC Docket No. 04-313); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)*

wholesale triggers be met before delisting a loop or transport unbundled element. It follows that at least for some period of time, there will be locations where circuits have been delisted but competitive alternatives to special access will not be present. Moreover, this likelihood will be present to an even greater degree with regard to delisted DS1 and DS3 loops.

The second fact, as was referenced in AT&T's Petition for Rulemaking and the Commission's NPRM, special access revenues for price-cap local exchange carriers have exploded. Although prices throughout the industry have declined due to greater competition and new technologies, special access revenues more than tripled from 1996 to 2001 with returns ranging from 21 percent to 49 percent in 2001. Moreover, the Commission references the substantial increases in the rates of return for special access services. These results are not indicative of a market where competitive pressures have "regulated" the pricing behavior of incumbent carriers with "pricing flexibility". Rather, this is indicative of insufficient competition to restrain pricing behavior. Moreover, TEXATEL believes that certain manipulative provisions in incumbent LEC special access tariffs accentuate these problems.

TEXATEL believes this docket is of critical importance. That said, TEXATEL also appreciates the need to be concise and avoid undue duplications. To that end, TEXATEL is limiting these comments to 3 specific issues of concern to highlight those issues while generally supporting the broader comments being filed by CompTel/ALTS. The specific issues discussed herein are: (1) the need to

reconsider predictive judgments that have not been supported by experience, and (2) the need to prevent the expiration of existing tariffed offerings, whether grandfathered or not, and (3) the need to prohibit/limit an incumbent LECs ability to implement/apply restrictive terms and conditions that are not appropriate in a wholesale product.

I. SPECIAL ACCESS RULES NEED TO BE REVISED IN RECOGNITION THAT PREDICTIVE JUDGMENTS SUPPORTING PRICING FLEXIBILITY HAVE NOT BEEN SHOWN TO BE CORRECT

TEXALTEL strongly supports the Commission's decision to take a comprehensive look at the Commission's regulations relating to special access. Evidence to date, much of it cited by AT&T in its petition for rulemaking ("AT&T Petition") and the Commission in the *NPRM* demonstrates that the presumptions underlying existing policy regarding special access rates have not borne out. The Commission correctly states in the *NPRM* that it must reconsider rules based on predictive judgments when the results are not consistent with what would have been anticipated from those predictive judgments. If competition were robust, rates of return would have declined to be closer to the 11.25% assumed by the Commission in the past. Yet, rates of return are multiples of that rate based on ARMIS data. Moreover, as the Commission notes in the *NPRM*, even if incumbents could validly argue that ARMIS data is not a perfect indicator of the true rate of return, the ARMIS data would still be a strong indicator showing the trend of increasing such rates of return.

At a minimum, TEXALTEL urges the Commission to proportionally reduce special access rates to reset those rates to an 11.25% rate of return. TEXALTEL also urges the Commission to take a very close look at the growth factor being applied. Anecdotally, it appears that the growth factor applied has been inadequate to capture real growth and that this may be a substantial cause to the extreme rates of return that have occurred. Moreover, many carriers are looking at having to increase their consumption of special access services based on “nonimpairment” findings in the *TRRO*. This anticipated growth should also be taken into consideration.

II. CONTINUATION OF EXISTING (OFTEN GRANDFATHERED) SPECIAL ACCESS TARIFFS

TEXALTEL notes further evidence of the lack of adequate competition in the area of special access that was not anticipated in the Commission’s predictive judgments. When incumbents were anticipating greater special access competition, they responded with various pricing plans. Some of these plans, for example, eliminated the per circuit term liability discussed in greater detail in the next section. As incumbent experience has shown less pricing pressure than was anticipated, incumbents have refused to renew those pricing plans. Instead, they have considered those plans to be closed and grandfathered until they expire.

At a minimum, the Commission should require these existing grandfathered pricing plans to continue without expiration. This is narrowly tailored and necessary if the Commission is going to require the incumbents’ offerings to more

closely replicate what would exist in a competitive environment. Beyond the minimum, TEXALTEL urges the Commission to order these existing plans be reopened so additional CLECs can benefit from them.

III. PROHIBIT APPLICATION OF PER CIRCUIT TERM LIABILITIES WHEN SPECIAL ACCESS IS PURCHASED AS A WHOLESALE INPUT

The Commission seeks comment regarding terms and conditions. TEXALTEL strongly urges the Commission to take a very close look at terms and conditions and what is appropriate particularly when special access sold to a wholesale customer (such as a CLEC). In particular, TEXALTEL members find provisions in special access tariffs requiring “per circuit” term liability to be highly anticompetitive and inconsistent with what would occur in a competitive wholesale market. While “per circuit” term liability is common in retail contracts, it is unusual in wholesale contracts. Instead, where a carrier is purchasing access services to reach many of its end users, “per circuit” term liability is often inapplicable. Instead, commercial contracts may have a portability option whereby that term liability would be avoided if the “early termination” is replaced by a new circuit somewhere else. Moreover and by analogy, it is important to note that termination liability has never been acceptable in Section 251 interconnection agreements.

Given the very high rates of return incumbents have garnered from their special access customers, it cannot be supported that termination liability of any kind is necessary for incumbents to recover their costs in aggregate.

CONCLUSION

TEXALTEL strongly supports the Commission's review of special access rates. As discussed herein, to avoid burdening the record, TEXALTEL has limited these written comments to a few specific issues that require highlighting while also supporting the comments filed by CompTel/ALTS.

The Commission must look at special access rates in the aggregate due to the excessive rates of return that are inconsistent with the predictive judgment that led to the granting of pricing flexibility in the first instance. Additionally, the Commission needs to address specific issues relating to existing, grandfathered offerings and the application of per circuit term liability so special access tariffs more appropriately reflect what would exist in a competitive market, particularly a competitive wholesale market.

Thank you for your consideration of these comments.

Respectfully Submitted,

TEXALTEL

By: /s/ Sheri Hicks

Sheri Hicks
Policy Director

Charles D. Land
Executive Director

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

AFFIDAVIT OF SHERI HICKS
ON BEHALF OF TEXATEL

Before me, the undersigned authority, on this ____ day of May, 2005, personally appeared Howard Siegel, who, upon being duly sworn, states the following:

1. My name is Sheri Hicks. I am over the age of 21, of sound mind, and am competent to testify as to the matters stated herein. I am the Policy Director for TEXALTEL. I have personal knowledge of the facts contained herein.
2. The facts contained in these comments and related attachments are accurate. Moreover, I have personal knowledge as to this information through the due course of my duties in my capacity as TEXALTEL's Policy Director.

Further Affiant sayeth not.

/s/
Sheri Hicks

Sworn to and subscribed to before me this ____ day of May 2005, to certify which witness my hand and seal.

_____/s/_____
Notary Public in and for the State of Texas
My Commission expires:_____